No. 12,431

IN THE

United States Court of Appeals

For the Ninth Circuit

DEAN ACHESON, Secretary of State of the United States,

Appellant,

vs.

YEE KING GEE, by Yee Don Found, his next friend,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Honorable Lloyd L. Black, Judge.

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLEE.

JACKSON & HERTOGS,
JOSEPH S. HERTOGS,
580 Washington Street, San Francisco 11, California,
Amicus Curiae.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT OF THE CASE.

On January 16, 1948, the appellee by his next friend, filed in the United States District Court for the Western District of Washington, Northern Division, a complaint asking for a declaratory judgment of United States nationality. The said complaint was filed pursuant to the provisions of Section 503 of the Nationality Act of 1940. (8 U.S.C. 903.)

The complaint alleges that YEE DON FOUND, father of the appellee, is a United States citizen; that

the said YEE DON FOUND first came to the United States for permanent residence on August 6, 1929; that the said YEE DON FOUND subsequently made two temporary visits to China; that the appellee, who was born on March 16, 1941, is the son of YEE DON FOUND; that the appellee, YEE KING GEE, acquired United States citizenship at birth under the provisions of Section 201(g) of the Nationality Act of 1940 (8 U.S.C.A. 601); that the American Consul General at Canton, China, refused to recognize the appellee's claim to United States nationality; and that the appellee claims permanent residence at Seattle, Washington, where his father resides. (T. 2-5.)

Many material allegations of the complaint are admitted in the answer. The answer, however, pleads several affirmative defenses, namely that the District Court at Seattle, Washington, does not have jurisdiction of the matter and that the appellee did not acquire United States citizenship at the time of his birth. (T. 8 and 9.) The first affirmative defense alleges that the place of residence of the defendant is the City of Washington in the District of Columbia. The second defense alleges that the father, YEE DON FOUND, had not resided in the United States for ten years at the time of the birth of the appellee on March 16, 1941.

The trial court found that the appellee had, upon substantial basis and in good faith, a claim to permanent residence at Seattle, Washington; that the trial court had jurisdiction of the matter; and that the appellee's father never abandoned his United States

residence during his two temporary trips to China prior to the birth of the appellee and subsequent to his admission in 1929. (T. 11-13.)

QUESTIONS.

1. Did the United States District Court at Seattle, Washington, have jurisdiction of this proceeding?

2. Did YEE DON FOUND, father of the appellee, have ten years residence in the United States prior to the birth of the appellee, YEE KING GEE?

STATUTE INVOLVED.

Section 503 of the Nationality Act of 1940 (8 U.S.C.A. 903) reads as follows:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn

application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided." (54 Stat. 1171-1172; 8 U.S.C. 903.)

Section 201(g) of the Nationality Act of 1940 (8 U.S.C. 601) reads in part as follows:

"A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had *ten years'* residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of *sixteen years,* the other being an alien: Provided, That in order to retain such

citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years *between the ages of thirteen and twenty-one years:* Provided further, That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of *sixteen years,* or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease. * * * (54 Stat. 1138-1139; 8 U.S.C. 601.)"

ARGUMENT.

JURISDICTION.

The word "jurisdiction" connotes the power to adjudicate a justiciable controversy. The power of the inferior federal courts emanates from statutory law.

Section 1 of Article 3 of the Constitution of the United States provides:

> "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time establish."

It was stated in the case of *Kline v. Burke Construction Co.,* 67 L. Ed. 226, 232, 43 S. Ct. 79, 260 U.S. 226 that:

> "Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold, or restrict such jurisdiction at its discretion, provided it does not extend beyond the boundaries fixed by the Constitution."

Section 1343 of Title 28, United States Code Annotated, provides that the United States District Courts shall have original jurisdiction in matters which affect the rights or privileges of citizens of the United States.

It was stated by the Supreme Court of the United States in *Binderup v. Pathe Exchange,* 68 L. Ed. 308, 314, 44 S. Ct. 96, 263 U. S. 291 that:

> "Jurisdiction is the power to decide a justiciable controversy, and includes question of law as well as of fact. A complaint setting forth a substantial claim under a Federal statute presents a case within the jurisdiction of the court as a Federal court; and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide the legal sufficiency of the facts proven. Its decision either way, upon either question, is predicated upon existence of jurisdiction, not upon the absence of it. Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous; or, in other words, is plainly without color of merit."

To present a case within the jurisdiction of the federal court, plaintiff must state a cause of action of which the statutes give federal courts jurisdiction, and whether the federal courts may assume jurisdiction is determinable by the allegations of the complaint. As a general rule, if the allegations of the bill in good faith make a claim within the jurisdiction of the court, the court has jurisdiction whether or not the claim is well founded.

> *Utah Fuel Co. v. National Bituminous Coal Comm.,* 59 S. Ct. 409, 306 U.S. 56, 83, L. Ed. 483, 487.

The pleadings in the case at bar show that there was existing at the time of filing of this complaint an actual controversy involving a federal question arising from federal statute. There can be no question as to the jurisdiction of the United State District Court at Seattle to decide the issue involved. Other federal courts have considered cases instituted under Section 503 of the Nationality Act of 1940:

> *Brassert v. Biddle,* Attorney General, 2 Cir., 148 F.2d 134;
>
> *Bauer v. Clark,* Attorney General, 7 Cir., 161 F.2d 397;
>
> *Attorney General v. Ricketts,* 9 Cir., 165 F.2d 193;
>
> *Podeau v. Acheson,* 3 Cir., 170 F.2d 306;
>
> *Look Yuen Lin v. Acheson,* 87 Fed. Supp. 463.

Thus it must be determined that the question presented is one not of jurisdiction, which is undisputed, but one of venue. It has often been said that jurisdic-

tion and venue are not to be confused. *Standard Stoker Co. v. Lower,* 46 F.2d 678, 683.

It is admitted that the general rule is that suits against government officials involving acts done in their official capacity, must be instituted in the place of their official residence. Since the present suit was not filed in the District Court for the District of Columbia, the place of residence of the defendant, it becomes necessary to discuss this question.

The territorial jurisdiction of the lower federal courts is, except as it is otherwise expressly provided by statute, confined to, and co-extensive with, the territorial limits of the district in which they are placed. 36 C.J.S. 811; *Albion-Idaho Land Co. v. Naf. Irr. Co.,* 97 F.2d 439.

Section 1391 of Title 28, U.S.C.A. states that venue shall be limited to territorial jurisdiction "except as otherwise provided by law".

Where a statute specifies the venue of particular actions, the general rule as to venue may not apply. The federal statute determines the venue of the federal court.

Louisville & N. R. Co. v. Chatters, 26 F.2d 403;
Doyle v. Loring, 107 F.2d 337, Certiorari denied 84 L. Ed. 1029.

Section 503 states: "* * * may institute an action * * * in the District Court of the United States for the District of Columbia *or* in the District Court of the United States for the district in which such per-

son *claims a permanent residence* * * *." A review of the complaint in the instant case shows that it meets these requirements. The appellee asserted a claim to permanent residence within the territorial jurisdiction of the United States District Court for the Western District of Washington, Northern Division. (Italics ours.)

The Congressional debates shed little light on the venue provisions of Section 503. Section 503 was not in the original bill as passed by the House. A number of amendments, including a provision similar to the present section, were added by the Senate just prior to passage. There was no discussion on the floor of the Senate at any time. Upon return of the bill to the House a committee was appointed to meet with two conferees from the Senate to discuss the proposed amendments. The Congressional Record, Vol. 86, Part 12, page 13244 shows the following:

> "Mr. Lesinski filed the following conference report and statement on the bill H.R. 9980, to revise and codify the nationality laws of the United States into a comprehensive nationality code:
>
> CONFERENCE REPORT
>
> * * * * * * *
>
> Amendment numbered 5: That the House recede from its disagreement to the amendment of the Senate numbered 5, and agree to the same with an amendment, as follows:
>
> In lieu of inserting the matter proposed to be inserted by the Senate amendment insert on page 92 of the House bill, between lines 10 and 11, the following:

(Section 503, as now enacted)

STATEMENT

* * * * * * *

Amendment No. 5: This amendment provides that persons claiming the rights or privileges of nationals of the United States might petition the district courts of the United States for judgments declaring them to be nationals. It provides further that any such person who is beyond the jurisdiction of the United States and has filed such petition might obtain from the appropriate consular officer a certificate of identity entitling him to enter into the United States. The House recedes with amendments which make a number of clarifying changes in the text of the Senate amendment and provide for the issuance of the certificate of identity only upon an application showing that the claim of nationality is made in good faith and has a substantial basis. The conference agreement also provides for appeals to the Secretary of State from denials of applications for such certificate of identity. The conference agreement transposes the text of this amendment to a more appropriate place in the bill and also make the necessary correction in section numbers."

Judge Erskine, in discussing the venue provisions of Section 503 in the case of *Look Yun Lin v. Acheson,* supra, stated:

"In the present case, where the plaintiff is abroad, and the issue of venue is raised, it is the District Court of the Northern District of California in which the facts of the case are most

> readily available, since plaintiff's claim to citizenship stems from her father, a resident of California. It would seem to be a perversion of Congressional intent to say that plaintiff must bring her case in Washington, D. C., particularly when viewed in conjunction with the provision of the statute which permits the plaintiff in such an action to apply for temporary admittance to this country."

It has always been the rule of the courts to consider the convenience of witnesses and the interest of justice. In this particular case the statute specifically provides that any person, whether residing in the United States *or abroad,* may institute an action in the district where such person *claims* a permanent residence. The provisions of this part would be an absolute nullity if the ordinary rules of venue were to be applied.

The appellant in his brief (P. 9) states that the requirement of a "claim to permanent residence" presupposes a prior residence in the United States.

The statute on its face shows no such limitation, the remedy having expressly been made available to "any person". "Any person" is defined in Corpus Juris, Vol. 48, page 1041, as "Anybody; any human being".

Where the language of the statute is plain and unambiguous, there is no occasion for construction, even though other meanings may be found; and the court cannot indulge in speculation as to the probability of possible qualifications which might have

been in the minds of the legislature, but the statute must be given effect according to its plain and obvious meaning.

U. S. v. Missouri Pac. Ry. Co., 49 S. Ct. 133, 278 U.S. 269;

Commissioner of Immigration v. Gottlieb, 265 U.S. 310, 44 S. Ct. 258;

U. S. v. Standnar Brewery, 40 S. Ct. 139, 251 U.S. 210;

Lake County v. Rollins, 9 S. Ct. 651, 130 U.S. 662.

The court cannot attribute to the legislature an intent which is not in any way expressed in the statute.

Johnson v. Southern Pac. Co., 36 S. Ct. 159, 239 U.S. 382.

However, it has been said that: "where the plain meaning of words used in a statute produces an unreasonable result, plainly at variance with the policy of the legislature as a whole", we may follow the purpose of the statute rather than the literal words.

U. S. v. Rosenblum Truck Lines, 86 L. Ed. 671, 676, 326 U.S. 455.

During a discussion on the floor of the House between Congressmen Rees and Jenkins, a question similar to that here presented was the subject of discussion. It was there stated that one who was born abroad of a citizen parent, and who had *never* resided in the United States had the right under this statute to file a petition in the federal courts.

86 Congressional Record, Part 12, p. 13247, et seq.

A review of the Congressional intention as reflected by the debate, fails to show any inclination of Congress to limit the scope of judicial review to those who had previously resided in the United States.

The appellee's claim to permanent residence as alleged in the complaint is not frivolous. If we followed the strict legal meaning of the word "residence", the provisions of the Statute in question providing for a judicial remedy for those who are abroad would be superfluous and useless. Therefore, it is asserted that the language used in this act should be interpreted in its broader legal terminology.

It is a well recognized principal that the terms "domicile" and "residence" when used in statutes are often construed as synonymous.

U. S. v. Curran, 299 F. 206;
Owens v. Huntling, 115 F.2d 160;
Petition of Aganesoff, 20 F.2d 978;
17 Am. Jur. 593;
19 C.J. 397;
28 C.J.S. 7.

A "domicile" is the place where the law regards a person to be, regardless of whether he is corporeally found there. It is the place assigned to him by law.

U. S. v. Novero, 58 F. Supp. 275;
U. S. v. Twelve Ermine Skins, 78 F. Supp. 734.

The domicile of a legitimate child, during minority and until emancipation, ordinarily follows that of the father, while the latter is alive.

Yarbrough v. Yarbrough, 54 S. Ct. 181, 290 U.S. 202;

Lamar v. Micou, 112 U.S. 452;
19 C. J. 411;
9 R. C. L. 547;
17 Am. Jur. 635.

The statute in this case specifically states the appellee need only make a claim of permanent residence, in order to establish venue. Here we have more. Under the ordinary legal concepts, the appellee, as a matter of law, has a bona fide domicile within the territorial jurisdiction of the District Court whereat this petition was filed. The claim is substantial and merits consideration of the court.

CITIZENSHIP.

The question raised by this appeal is whether YEE DON FOUND, father of the appellee, had ten years residence in the United States prior to the birth of the appellee as required by the provisions of Section 201(g) of the Nationality Act of 1940.

The record shows that YEE DON FOUND first arrived in the United States at Boston, Massachusetts, on August 6, 1929; that YEE DON FOUND subsequently made two temporary trips to China, departing and returning as follows:

Departing August 21, 1936;

Returning August 8, 1938;

Departing January 6, 1940;

Returning September 4, 1941.

The appellee was born during the latter trip to China.

If the statute contemplates actual physical presence in the United States for a ten year period, the appellant's contentions are correct. If the law requires residence in its ordinary legal concept, the appellee must prevail.

The lower court made findings of fact wherein it is concluded that YEE DON FOUND made two temporary trips to China for the purpose of visiting his relatives and for no other purpose; that he never intended to abandon his United States residence; and that the said YEE DON FOUND has resided continuously in the United States since August 6, 1929.

It has often been stated that in the absence of statutory authority appellate courts will not review questions of fact, they will limit their review to correction of errors at law.

Champlin Refining Co. v. Gasoline Products Co., 29 F.2d 331;

Bogan v. Hynes, 65 F.2d 524, certiorari denied, 54 S. Ct. 126, 78 L. Ed. 594.

When the appellate court does consider the action of the lower court, only evidence favorable to the successful party will be considered.

Fidelity & Casualty Co. of New York v. Griner, 44 F.2d 706.

It is contended that there is more than sufficient evidence to show that the lower court's findings are not an abuse of its discretion. In addition, it is asserted that the lower court placed the proper interpretation upon statutory language used in Section 201(g).

Section 104 of the Nationality Act provides:

> "For the purposes of Section 201, 307(b), 403, 404, 405, 406, and 407 of this Act, the place of general abode shall be deemed the place of residence."

Reports and explanatory statements of legislative committees, even though not binding on the courts, may be considered as indicative of a legislative intent when the language used in a particular Act is not clear or is ambiguous.

City of New York v. Saper, 69 S. Ct. 554, 560; 336 U.S. 328;

Woods v. Western Holding Co., 173 F.2d 655;

Northwestern Mutual Fire Ass'n. v. C.I.R., 181 F.2d 133.

House Committee Report on H.R. 9980, which later became the Nationality Act of 1940, P. 54, shows:

> " 'Place of general abode' is about as broad a definition as I have ever seen."

Report of the Committee on the Judiciary, pursuant to Senate Resolution 137, a resolution to make an investigation of the immigration system, is enlightening. Even though this report is subsequent to the enactment of the Nationality Act of 1940, this committee made a comprehensive study of all existing laws and presented an omnibus bill containing many proposed changes. At page 713, in said publication, the committee stated when considering section 201(g):

> "The committee finds that the provisions of existing law relative to citizenship of children born

abroad of a citizen parent or parents are confusing and difficult to administer and interpret, particularly with reference to residence requirements, both of parents and children.'

* * * * * * *

'The present law requires 10 years' residence, at least 5 of which were after the age of 16. The "residence", however, does not necessarily mean physical presence.' "

When a statute is not clear, the courts will often look to executive construction for guidance in interpretation of the language used.

The Supreme Court of the United States stated in the case of *U. S. v. Cerecedo Hermanos y Compania,* 52 L. Ed. 821, 822:

"We have said that, when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution."

Also:

Bowles v. Seminole Rock & Sand Co., 89 L. Ed. 1700, 1702;

Brewster v. Gage, 74 L. Ed. 457, 462.

It was stated by the Court of Appeals, in 2nd Circuit, in the case of *North American Utility Securities Corp. v. Posen,* 176 F.2d 194 at P. 197:

"An administrative interpretation which runs counter to a legislative enactment, is, of course, of no significance; but where the meaning of a statutory provision is not clear, the interpretation put upon it by those charged with the duty

of administering the Act is entitled to great weight."

The Court of Appeals for the 7th Circuit expressed the same view in the case of *Bowles v. Mannie & Co.*, 155 F. 129, wherein the court stated:

"Be that as it may be, we must, however, be mindful of the admonition of the courts that the construction given to a statute (regulation) by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons, *U. S. v. Moore,* 95 U.S. 760, 763, 24 L. Ed. 558, and that the administrative interpretation is of controlling weight unless plainly erroneous or inconsistent with the regulations."

This Honorable Court expressed the same view in the case of *Ada County v. Oregon Short Line R. Co.*, 97 F.2d 669, 671, i.e.:

"* * * the rule is that an interpretation of a statute by an agency charged with enforcement thereof is entitled to consideration and weight."

Also see:

Queensboro Farms Products v. Wickard, 137 F.2d 969;

U. S. v. Moskowitz, 170 F.2d 870, 873;

N. L. R. B. v. Medo Photo Supply Corp., 135 F.2d 279, 281, affirmed 88 L. Ed. 1007.

The Immigration and Naturalization Service and not the defendant is charged with the administration of the Nationality Act of 1940.

Section 327 of the Nationality Act, 8 U.S.C.A. 727, specifically delegates the administration of the Nationality Act to the Commissioner, Immigration and Naturalization Service, under the immediate supervision of the Attorney General.

Section 339 of the same Act, 8 U.S.C.A. 739, as amended, states that the Commissioner may issue to one who acquired United States citizenship under the provisions of Section 201(g) a certificate of citizenship provided the Commissioner is satisfied that citizenship was so acquired.

The appellee in this action sought to obtain from the defendant, the appellant, a passport or travel document for use in coming to the United States.

It has been stated that "a passport, when granted, is not conclusive, nor is it even evidence, that the person to whom it is granted is a citizen of the United States." Passports are "not issued for use as certificates of citizenship, and the Department of State will not issue a passport to a person who indicates that he desires it merely for the purpose of establishing his status as a citizen of the United States." Both of the foregoing quotations are from official Department of State Publication 1708, Hackworth, Digest of International Law, Vol. III, Pgs. 435 and 436. Therefore, it must be concluded that the Immigration and Naturalization Service is the particular administrative body directed to decide who is and who is not a citizen of the United States.

In the case of *Lynn Patricia Burnard,* 56172/878, the Board of Immigration Appeals held on July 5, 1945, that the infant should be admitted as a United States citizen. In that case the citizen-father resided outside of the United States from the age of 19 to 21. It was held that he maintained his general abode in the United States and that his child born abroad acquired United States citizenship under Section 201(g).

In the case of *Sydney Joel Kadwell,* file 1415-830, the citizen-mother departed from the United States at the age of 18 years in order to join her husband who was then serving as a member of armed forces of Canada. It was held that nonetheless, the child, who was born after the mother's twenty-first birthday, acquired United States citizenship under Section 201(g).

In the case of *Wong Wah Chill,* file 56232/575, it was held that even though the record showed the father was not physically present in the United States for the ten year period, his principal place of abode was in the United States. In this case, the father had made a temporary trip to China for a period of nine months and twenty-nine days. It was found that the child is a citizen of the United States under Section 201(g). Other cases in point are:

In re April May Van Gilder, file AA4584, March 12, 1946;

Richard Kees Brameyer, file A-6405632, May 12, 1947;

Matter of Foster, file 23/91438, September 17, 1943;

Matter of Cornelius, 56175/231, May 8, 1945;

In re Eldeen Wai Hoi Fok, A-7047289, Dec. 6, 1948;

In re Chu Sze Chiang, 1300-99443, July 28, 1950.

The case of *Cornelius* was published in the Immigration and Naturalization Service Monthly Review, June, 1946, Vol. III, No. 12, at page 325.

It is submitted that the well established administrative rule, which has been consistently followed over a period of years, by the executive department charged with the enforcement of the Nationality Act is entitled to substantial weight in determining the proper construction to be placed upon Section 201(g) of the Nationality Act of 1940.

CONCLUSION.

The United States District Court for the Western District of Washington, Northern Division, had the power to adjudicate this justiciable controversy. Section 503 of the Nationality Act of 1940, by specific statutory language, states that venue of actions arising under this statute may be instituted in the district where the aggrieved claims permanent residence. That in this case the appellee in his complaint made a claim, which is not frivolous, to permanent residence within the territorial jurisdiction of the lower court.

The appellant's motion to dismiss upon this ground was properly denied.

The father of the appellee has been a citizen of the United States since birth and a bona fide resident of the United States since August 6, 1929. Section 201(g) of the Nationality Act of 1940 does not contemplate actual physical presence in the United States for the full ten year period. Residence within the meaning of the statute can only be determined from the union of act and intent as disclosed by the facts in the particular case. The lower court's finding that the father did not intend to abandon his residence during his temporary trips abroad are binding upon this court. Therefore, it must be concluded that the father did have ten years residence in the United States prior to the birth of the appellee.

The judgment of the District Court should be affirmed.

Dated, San Francisco, California,
September 1, 1950.

Respectfully submitted,
JACKSON & HERTOGS,
By JOSEPH S. HERTOGS,
Amicus Curiae.